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FILED
JUL 6 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 209

EL HOSS ENGINEERING & TRANSPORT CO., LTD.,

Petitioner,

—against—

AMERICAN INDEPENDENT OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 6, 1961.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the judgment of a divided panel of the United States Court of Appeals for the Second Circuit (Waterman, Friendly and Clark, Circuit Judges), which reversed an order of the District Court of the United States for the Southern District of New York directing the respondent to proceed to arbitration.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Bryan, D. J.) reported at 183 F. Supp. 301 is printed in Appendix B hereto, p. 32. The opinion of the Court of Appeals reported at 289 F. 2d 340 is printed in Appendix B hereto, p. 18.

Jurisdiction

The judgment of the Court of Appeals was entered April 10, 1961 (R. 56). Rehearing was denied May 11, 1961 (R. 66). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

The parties entered into a contract containing an arbitration provision covering "any disagreement". Respondent signed and accepted the contract subject to petitioner's compliance with specified conditions. Both parties commenced performance, but a dispute arose with respect to petitioner's compliance with the conditions and respondent caused performance to stop. Petitioner invoked the arbitration clause and upon respondent's refusal to arbitrate, sued to compel arbitration under the Federal Arbitration Act, 9 U. S. C. 4. The District Court held that there was a valid agreement to arbitrate and directed respondent to proceed to arbitrate. The Court of Appeals reversed and remanded the case for trial of the issue whether petitioner had fulfilled the specified conditions. The questions are:

1) In determining the scope of an arbitration provision under the Federal Arbitration Act, where there is an applicable body of State statutory and decisional law, does state or federal law govern construction of the contract?

2) Should Section 4 of the Federal Arbitration Act be construed to require a judicial trial of disputes over conditions, prior to determining whether or not to compel arbitration?

Statutes Involved

The statutory provisions involved are Secs. 2, 3 and 4 of the Federal Arbitration Act, 61 Stat. 669, 68 Stat. 1233, 9 U. S. C. 2, 3 and 4. These provisions are reproduced in full, *infra*, Appendix A, p. 16.

Statement of the Case

On October 1, 1959, the respondent, American Independent Oil Company, a Delaware corporation, entered into an agreement with petitioner, El Hoss Engineering and Transport Co., Ltd., which provided for the sale by the respondent to the petitioner of a quantity of automotive and oil field transportation equipment, the lease of such equipment (including both the equipment sold and other equipment) by the petitioner to the respondent, and the furnishing of transportation and other services by the petitioner to the respondent. The agreement was executed in Kuwait on the Arabian Gulf and was to be performed in what is called the Neutral Zone of Kuwait which is under the joint sovereignty of the Sheikdom of Kuwait and the Kingdom of Saudi Arabia.

On or about October 1, 1959 the respondent delivered the purchased equipment to the petitioner, and the petitioner began to perform the services required of it under the agreement. The agreement required the petitioner to furnish installment promissory notes payable to the respondent for the value of the equipment sold, which notes were to be endorsed and guaranteed by a financial institution acceptable to the respondent. The petitioner was also required to furnish a performance bond and liability insurance.

The agreement contains an arbitration clause, which reads as follows:

> "11. In the event of any disagreement between the parties hereto as to the effectuation of this agree-

ment, or performance thereof, or any part of the agreement, each party undertakes to use its best efforts to resolve said disagreement without submission to arbitration. However, should such solution be impossible, the parties hereto will select a mutually acceptable arbitrator whose decision as to the matters presented to him shall be final. If the parties cannot agree on such an arbitrator, each shall nominate an arbitrator of its choice and these shall in turn select a third, and the decision of a majority of this panel of three shall be final as to all matters submitted. This paragraph shall not effect the rights of the company to terminate this agreement under the provisions of paragraphs three (3) and four (4) of Section One (1)."

The signature page of the agreement reads as follows:

"This agreement consisting of sections one through thirteen inclusive and attachments one through seven inclusive totaling *fifty-four* pages is signed by authorized agents of the contractor this *1st* day of October, 1959.

EL HOSS
Witness Claude T. Dinkel, Jr.

and accepted by the Company this 1st day of October, 1959, subject to compliance with the conditions of this agreement as to guarantees or endorsements by third parties in favor of the Company covering the unpaid installments on purchase price, performance bonds and insurance coverage, etc., not later than fourteen (14) days from the date of the acceptance by the Company.

KEN BODINE,
American Independent Oil Company
Witness C. E. McCarty"

Time for the petitioner to supply the guaranteed promissory notes, performance bond and liability insurance and comply with certain other financial provisions of the agree-

ment, was successively extended by the respondent from October 14, 1959 to November 1, 1959, and then to November 20, 1959. Prior to and after the extensions of time the parties negotiated with one another concerning the precise requirements of the financial terms of the agreement needed to satisfy the respondent. Meanwhile the petitioner proceeded from October 1, 1959 to supply the services contemplated by the agreement which the respondent accepted. While the petitioner was still trying to satisfy the respondent's conditions for securing the payment of the notes, which was the principal item of dispute, the respondent notified the petitioner, on December 13, 1959, to cease operations under the agreement effective December 15, 1959. The petitioner through its counsel notified the respondent on December 14, 1959 that it desired to proceed with arbitration under the arbitration clause and designated Theodore W. Kheel of New York as its arbitrator. The respondent replied "that arbitration * * * does not apply under the circumstances, and we neither accept nor reject arbitration as suggested in your letter."

Application was made by the petitioner to the District Court of the Southern District of New York on December 29, 1959 for an order to compel arbitration under 9 U. S. C. Section 4.

The District Court heard the matter on December 30, 1959, and January 8, 1960 on affidavits and oral argument. Respondent urged the District Court to hold a trial of the issues of fact raised by its affidavits in opposition to the affidavits of the petitioner. The District Court reserved the question of whether or not a trial would be held until further affidavits and briefs were filed.[1]

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[1] A portion of the colloquy between the District Court and respondent's counsel on the question of a trial is cited on pages 19, 20, 21 of the Appendix to Respondent's Brief on Appeal to the Second Circuit, Volume I of the Record. The full transcript on this point is set forth in Apendix D hereto.

The District Court held that there was a valid agreement for arbitration, and directed the respondent to proceed to arbitration.

The respondent appealed to the Court of Appeals for the Second Circuit, which reversed the decision of the District Court, and remanded the case to the District Court for a full trial of the issue as to whether the petitioner had performed what the Court of Appeals considered to be the necessary conditions required of it in order that the agreement might become effective so that the petitioner could compel the respondent to arbitrate.

Judge Clark dissented from the majority of the panel of the Court and agreed with the decision of the District Court. On the petition for rehearing *en banc* Judge Clark was joined by Judge Smith in favor of granting the petition. The other two judges, Lumbard and Moore, joined Judges Waterman and Friendly in denying the petition.

Both the petitioner and the respondent in their presentations to the District Court treated the case as requiring the application of the Federal Arbitration Act and both New York and Federal case law. The District Court found from this an implied stipulation to apply United States law, and the Court of Appeals decided that this was proper under the circumstances.

REASONS FOR GRANTING THE WRIT

I

This case raises important and novel questions of statutory construction which were raised in *Lawrence* v. *Devonshire Fabrics Inc.*, 271 F. 2d 402, on which this Court granted certiorari 362 U. S. 909. However, the case was never argued.[2] None of the cases which have

[2]The case was subsequently settled and the petition dismissed pursuant to Rule 60, 364 U. S. 801.

reached this Court on issues raised by the Federal Arbitration Act have decided these questions.[3]

The Court of Appeals for the Second Circuit in *Lawrence* v. *Devonshire Fabrics Inc. (supra)* laid down the rule that in cases which involve "commerce" within the meaning of Sections 1 and 2 of Title 9, Federal Law, as derived from the Arbitration Act, and not State Law, determines the validity and enforceability of the arbitration provision, and that the arbitration provision is a separable part of the contract under the federal law thus created. However, in the case at bar the Second Circuit reversed itself on the question of separability, and decided that the enforceability of the arbitration clause depends upon an interpretation of the intent of the parties as determined by the whole contract.

1. *A Conflict exists between the Circuits on the applicability of State Law.* The supremacy of federal law in cases involving the Federal Arbitration Act enunciated in *Lawrence* v. *Devonshire,* has not been followed by the other circuits. The Court of Appeals for the First Circuit in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F. 2d 915, *Cert. denied,* 364 U. S. 911, declined to fol-

[3]Decisions of this Court have dealt with the constitutionality of Section 8 of the Act, *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263; the validity of granting a Section 3 stay of proceedings under the authority of Title 28 Section 274 (b), in a case brought under the diversity of citizenship provisions of 28 U. S. C. Sec. 1332, *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; the applicability of the Arbitration Act to an *in personam* action in admiralty arising in a State Court (reversing the N. Y. Court of Appeals), *Red Cross* v. *Atlantic Fruit Co.*, 264 U. S. 109; the enforceability of an arbitration provision in a contract subject to Title 15 Section 77a et. seq. (The Securities Act of 1933), *Wilco* v. *Swan*, 346 U. S. 427; and the applicability of the Arbitration Act to a case arising under Title 28 of the U. S. Code Section 1332 where neither commerce nor a maritime transaction was involved, *Bernhardt* v. *Polygraphic Co. of America Inc.*, 350 U. S. 198.

low the Second Circuit on the question of federal law, and decided that New York Law governed.

The Ninth Circuit also takes the view that the interpretation of a contract involved in an arbitration dispute must be determined by reference to state law, *Ross* v. *20th Century Fox Film Corp.*, 236 R. 2d 632. The Sixth Circuit takes an in-between position on the applicability of state law, *American Airlines Inc.* v. *Louisville & Jefferson C. A. B.*, 269 F. 2d 811, 817, holding that:

> "Section 2 and hence Sections 3 and 4 of the Federal Arbitration Statute requires of course that if Court action on the contract is to be stayed, or if arbitration is to be compelled, the contract in which the agreement to submit to arbitration appears, as well as the arbitration provisions themselves, must be valid and enforceable in accordance with ordinary contract principles under applicable State and Federal Law."

The conflict between the circuits requires a delineation by this Court of the extent to which its opinion in *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U. S. 198 requires that federal court determinations of the enforceability of agreements for arbitration under federal law take into consideration the decisions of the state courts. The decision of the Second Circuit in the case at bar is contrary to the decisions of the New York Court of Appeals, as we point out below, and leaves no room for any such consideration, and, indeed, specifically rejects it.

2. *Under the separability doctrine laid down by the Second Circuit in Lawrence* v. *Devonshire, the decision of the District Court should have been affirmed.* In reversing this case on the appeal the Second Circuit limited the *Lawrence* case to fraud, and effectively overruled its own

decision in *Amicizia Societa Navigazione v. Chilean Nitrate & Iodine Sales Corp.*, (in which the opinion was written by Judge Clark) 274 F. 2d 805, *Cert. denied*, 363 U. S. 843. This creates an ambivalence in the application by the Second Circuit of its own doctrine of separability as a rule of statutory construction, and adds further confusion to the body of federal decisions which the lawyers and businessmen of New York City, the nation's busiest arbitration forum[4] must look to for guidance.

3. *The decision is in conflict with New York Law.* Had the Court below followed the New York Court of Appeals it would have affirmed the decision of the District Court on the basis of *Petition of Uraga Dock Company* 6 A. D. 2d 443, 179 N. Y. S. 2d 474, *Affirmed* 6 N. Y. 2d 773, 186 N. Y. S. 2d 669. While the case at bar was under consideration the New York Court of Appeals issued a decision of the broadest impact on the enforceability of arbitration agreements under the New York Statute: *In The Matter of Arbitration Between Exercycle Corporation and James Maratta*, March 23, 1961, 9 N. Y. 2d 400, 214 N. Y. S. 2d 353. In the *Exercycle* case the New York Court held that where the resolution of a dispute as to the mutuality of a contract involves the issue of whether there was ever

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[4]In addition to the American Arbitration Association there are at least 14 business and trade associations in New York City which maintain arbitration forums. Inquiries addressed to these associations disclose that more than 1,400 arbitrations were held in New York City in 1960 alone. Business and trade associations in New York which maintain arbitration panels include: American Fur Merchants Association Inc.; New York Produce Exchange; American Spice Trade Association; New York Cocoa Exchange Inc.; General Arbitration Council of the Textile Industry; Ship Brokers & Agents Association; American Stock Exchange; National American Wholesale Lumber Association; The Real Estate Board of New York, Inc.; Association of Food Distributors Inc., New York Employing Printers Association, Inc.; and The New York Stock Exchange.

any agreement at all, the issue is for the arbitrators and not for the Court. Affirming the Appellate Division, which had affirmed a decision of the Supreme Court of New York County denying a stay of arbitration, the New York Court of Appeals said (p. 355):

> "We too agree that there should be arbitration, but we reach our conclusion by a route quite different from that taken by the Courts below. In our view, the question whether the contract lacked mutuality of obligation, depending as it does primarily on a reading and construction of the agreement, and involving, as is obvious from the disagreement amongst the judges of this Court and the Courts below, substantial difficulties of interpretation, is to be determined by the abritrators, not the Court. Once it be ascertained that the parties broadly agreed to arbitrate a dispute "arising out of or in connection with" the agreement, it is for the arbitrators to decide what the agreement means and to enforce it according to the rules of law which they deem appropriate in the circumstances."

The decision in the Exercycle case was followed in a later case. *De Laurentiis* v. *Cinematographica de las Americas, S. A.*, April 27, 1961, 9 N. Y. 2d 503, 215 N. Y. S. 2d 60. In contrast to the present "liberal" doctrine of the New York Courts the Second Circuit concerns itself

> "* * * with ascertaining the intent of the parties from an examination of the entire instrument they bound themselves by and from the meaning of the language they used in their agreement—The traditional approach of common law judges when questions involving the validity or interpretation of contracts are presented for judicial resolution." (Appendix B, p. 23)

Thus the decision of the Court below is squarely in conflict with New York law on interpretations of intent in written

contracts which contain arbitration clauses, notwithstanding the fact that the New York Act was the model for the Federal Statute.[5]

As a consequence the Second Circuit is now imposing obstacles to arbitration in situatjons like the case at bar, while the New York Court is removing them[6]. This paradox grows out of the Second Circuit's construction of the Federal Arbitration Act to exclude any consideration of State law.[7] If the Second Circuit, when it decided the case at bar had applied the principles laid down in *Bernhardt* v. *Polygraphic Co., of America Inc., (supra)* it would have followed the New York decision in the *Uraga* case and would have looked more closely at the recent decisions of the New York Court of Appeals. It would not have reversed the District Court and the Federal Arbitration law in the Second Circuit would then be consistent with New York law.

4. *The decision of the Court below ignores the plain wording of Section 2 of the Act.* By remanding the case to the District Court (Appendix B, p. 27) "for a full trial of the issue whether El Hoss performed

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[5]The pertinent portions of the New York Arbitration Statute, Article 84, Sections 1448, 1449, 1450 and 1451 of the Civil Practice Act are set forth in Appendix C, p. 47

[6]A panel of the Second Circuit consisting of Judges Medina, Lumbard and Barger decided the *Lauro* case. A different panel of the Court consisting of Judges Waterman, Friendly and Clark, with Judge Clark dissenting, decided the case at bar. It is the practice of the Court of Appeals for the Second Circuit to sit in panels of three, and rarely to grant petitions for rehearing *en banc*.

[7]There are now eighteen States which have enacted Arbitration Statutes modeled upon the New York Statute: New Jersey (1923); Massachusetts (1925); Oregon (1925); Hawaii (1925); California (1927); Louisiana (1928); Pennsylvania (1928); Arizona (1929); Connecticut (1929); New Hampshire (1929); Rhode Island (1929); Ohio (1931); Wisconsin (1931); Michigan (1941); Washington (1943); Florida (1957); Minnesota (1957); and Wyoming (1959).

the necessary conditions required of it in order that the contract might become effective and El Hoss could therefore compel Aminoil to proceed to an arbitration", the Court below placed upon Section 4 of the Act a construction which conflicts with the provisions of Section 2. Section 2 limits the area of attack on the enforceability of arbitration provisions to "such grounds as exist in law or in equity for the revocation of any contract." Even stating the issue in the form most favorable to the Appellee i.e. "whether the contract ever came into existance", the Court below should not have ignored the precise wording of Section 2 which makes the written provision of the contract "to settle by arbitration a controversy *thereafter arising out of such contract or transaction*" enforceable except on such grounds as exist in law or equity *for revocation*." The dispute over the conditions arose after the execution of the contract which contains the arbitration provisions, and the fulfillment of conditions is not a ground of revocation, whatever else it might be.

5. *Section 4 of the Act does not require a finding by the District Court that the financial conditions were performed.* The Act provides that "the Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." After reading the affidavits the District Court held that the parties entered into a valid and binding agreement to arbitrate (Appendix B, p. 42). Under the wording of the statute the District Court was not required to do more to satisfy itself that an agreement was made. Contrarily the Court below held in effect, that the District Court could not fulfill the directions of the

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*Italics supplied.

Statute without adjudicating the disagreement between the parties on the issue of the performance of the financial conditions and making specific findings of fact, thus placing upon the words of the statute a strained and restricted meaning. As stated by Judge Clark in his dissent (Appendix B, p. 28) "The problem which has caused difficulty is whether the Court must also evaluate compliance with those contract provisions which constitute conditions precedent to the contract generally, but which are not expressly made conditions precedent to arbitration."

This Court has never had this problem before it. In the *Lawrence* case the Second Circuit took the same view that Judge Clark took in the case at bar, stating (271 F. 2d at p. 408). "Whether the bargain evidenced by the contract or agreement is or is not valid cannot differ essentially from the question of whether any other meeting of the minds of the parties will be recognized as having created certain rights. And the same may be said of the rules or principles to be evolved in connection with the construction and interpretation of the agreement."

The words "the making of the agreement for arbitration" as used in Section 4 of the Act must be construed to mean the factual execution of the paper containing the arbitration provisions without regard to the consequences of defective performance of the rest of the agreement, otherwise the saving clause in Section 2 is superfluous. The error of the Court below lies in its attempt to determine the intent of the parties only as expressed in the so-called "acceptance clause", while ignoring the intent expressed in the arbitration clause. The District Court read the Arbitration Act correctly, and properly decided that there were no issues that required a full trial, on the basis of the decision of the Second Circuit in the *Lawrence* case, the decision of this Court in *Wilko* v. *Swan* (*supra*), and the decision of the New York Court of Appeals in *Petition of Uraga Dock Co., Ltd.*, (*supra*).

The Federal Arbitration Act should be construed to furnish a set of broad and realistic principles of general application to guide both the State Courts and Federal District Courts in enforcing arbitration agreements, principles that are adequate to deal with the wide range of attacks on validity and enforceability of arbitration agreements which ingenious counsel can devise, including not only fraud but also interpretations of intent derived from reading the contracts after they have been executed and the disputes have arisen."

The decision in the case at bar foreshadows further conflicts with New York law, is contrary to earlier decisions of this Court, and underscores the need for a reaffirmation by this Court of the broad purpose of the Federal Arbitration Act which it laid down in *Bernhardt* v. *Polygraphic Co., of America, Inc.*, (*supra*) and *Wilco* v. *Swan* (*supra*).

6. *A conflict between Federal and State Arbitration Acts should be avoided to avoid a conflict of remedies.* There appear to be no cases considered by this Court involving the statutory construction of an act of Congress, remedial in nature, which parallels a State statute proving the same remedy. The decisions of this Court in cases involving the exercise by Congress of its commerce and police powers which invade the field of State regulation have generally held that in ascertaining the scope of Congressional legislation "a due regard for a proper adjustment of the local and national interest in our Federal scheme must always be in the background" *Federal Trade Commission* v. *Bunte* 312 U. S. 349, see also *Palmer* v. *Massachusetts* 308 U. S.

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[9]The concurring opinion of Judge Lumbard in *Metro Industrial Painting Corp.*, v. *Terminal Construction Co., Inc.* 287 F. 2d 382, 387, stating that whether the commerce requirement of Section 2 is satisfied depends upon the contemplation of the parties rather than upon what they actually did, promises a further extension by the Second Circuit of the common law approach to interpretations of intent to quality written arbitration agreements for enforcement.

79; *Davies Warehouse Co.* v. *Bowles* 321 U. S. 144. In view of the fact that the Federal Arbitration Act and the New York State Act contain virtually identical language relating to the validity and enforceability of written arbitration agreements, this Court should give to the Federal Act a construction broad enough to accommodate the recent New York decisions, and thus avoid in future cases arising under the Federal Act the conflicts between State and Federal remedies which arose out of the diversity of citizenship jurisdiction of the Federal Courts before the decisions in *Erie Railroad Company* v. *Tompkins* 304 U. S. 64, and *Bernhardt* v. *Polygraphic Co., of America, Inc.* (*Supra*).

CONCLUSION

To affirm the intent of Congress that commercial arbitration be available as an expeditious way of settling the widest possible range of contract disputes where the commerce requirement of the statute is satisfied, to relieve crowded court calendars, to lighten the growing work load of State and Federal Courts, to harmonize the decisions of the Federal and State Courts in New York, to avoid the further proliferation of arbitration suits which the confusion engendered by the Second Circuit invites, and to resolve the conflicts between the Circuits on the applicability of State law, this Court should grant a writ of certiorari, and the judgment below should be reversed.

Respectfully submitted,

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July 6, 1961.

APPENDIX A

Title 9 U. S. Code Arbitration

"§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

"§ 3. *Stay of proceedings where issue therein referable to arbitration.*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

"§ 4. *Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration, notice and service thereof; hearing and determination.*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court

which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 114—October Term, 1960.

(Argued December 7, 1960 Decided April 10, 1961.)

Docket No. 26384

EL HOSS ENGINEERING & TRANSPORT CO., LTD.,
Petitioner-Appellee,

v.

AMERICA : INDEPENDENT OIL COMPANY,
Respondent-Appellant.

Before:

CLARK, WATERMAN, and FRIENDLY,
Circuit Judges.

Appellee, alleging arbitrable disputes had arisen between it and appellant under a contract providing for arbitration, filed a petition under Section 4 of the Federal Arbitration Act seeking an order directing appellant to proceed to arbitration. Appellant seeks review of an order, United States District Court for the Southern District of New York, Bryan, *J.*, granting appellee's petition. Order to proceed to arbitration reversed and cause remanded for trial on issues raised as to whether threshold conditions

had been performed by appellee so as to put it in a position where it could demand arbitration of disagreements arising out of performance of contract.

WATERMAN, *Circuit Judge*:

El Hoss Engineering & Transport Co., Ltd. (El Hoss) petitioned the United States District Court for the Southern District of New York, pursuant to Section 4 of the Federal Arbitration Act, 9 U. S. C. § 4, for an order directing American Independent Oil Company (Aminoil) to submit certain disputes to arbitration as allegedly provided for in an agreement made by the two parties. Judge Bryan issued an order compelling Aminoil to submit to arbitration (183 F. Supp. 394) (1960) and Aminoil appeals.

El Hoss is a Lebanese corporation with its principal place of business in Beirut, Lebanon. Aminoil is a Delaware corporation with its principal place of business in New York City. The alleged agreement which we must construe involves commerce and the amount in controversy far exceeds $10,000. Therefore, the court below had jurisdiction to entertain the petition. *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198 (1956).

Robert Lawrence Co. v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 [(2 Cir. 1959), *cert. granted* 362 U. S. 909, *dismissed pursuant to Rule 60*, 364 U. S. 801 (1960).] holds that the validity and interpretation of an arbitration agreement must be determined by the federal substantive law of arbitration as expressed in the Arbitration Act.[1] Accord.

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[1] "We, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate

Appendix B

Kinoshita & Co. v. *American Oceanic Corp.* (2 Cir. March 16, 1961); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805 (2 Cir.), *cert. denied* 363 U. S. 843 (1960). *Contra, Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F. 2d 915 (1 Cir.), *cert. denied* 364 U. S. 911 (1960). The question for decision here is: Did the parties make a binding contract to arbitrate disagreements as to whether certain conditions to which the contract was made "subject" were complied with?[1]

In 1959 Aminoil distributed a 54 page instrument upon which prospective bidders could tender bids for the purchase of Aminoil's automotive and construction equipment, and for the job of providing the transportation service Aminoil would require. It proposed to sell transportation equipment valued at nearly one million dollars and further proposed to lease this equipment from the successful bidder at a substantial rental. Aminoil, by affixing its signature below that of the successful bidder in a space provided for this purpose on page 54 of the instrument, could accept that bid. However, below this signature line there was a clause conditioning Aminoil's acceptance upon the bidder's compliance with the conditions of the agreement by providing guarantees covering purchase price, performance bonds and insurance protection:

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controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined." *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 at 409.

The lower court determined that the law of the forum was applicable. 183 F. Supp. 394 at 399-400. Under the circumstances outlined therein that decision was proper.

> "subject to compliance with the conditions of this agreement as to guarantees or endorsements by third parties in favor of the company covering the unpaid installments on purchase price, performance bonds and insurance coverage, etc., not later than fourteen (14) days from the date of the acceptance by the company."*

This conditional acceptance expressly applied to "this agreement consisting of sections one through thirteen inclusive and attachments one through seven inclusive totaling fifty-four pages"—i.e., it applied to the entire instrument. Included as part of the instrument was clause eleven of section one, the clause that provided for arbitration:

> "11. In the event of any disagreement between the parties hereto as to the effectuation of this agreement, or performance thereof, or any part of the agreement, each party undertakes to use its best efforts to resolve said disagreement without submission to arbitration. However, should such solution be impossible, the parties hereto will select a mutually acceptable arbitrator whose decision as to the matters presented to him shall be final. If the parties cannot agree on such an arbitrator, each shall nominate an arbitrator of its choice and these shall in turn select a third, and the decision of a majority of this panel of three shall be final as to all matters submitted. This paragraph shall not affect the rights of the company to terminate this agreement under the provisions of paragraphs three (3) and four (4) of section one (1)."

The lower court, relying on *Robert Lawrence* v. *Devonshire Fabrics, Inc.*, *supra*, declared that this clause was sep-

*The entire original instrument was in upper case throughout.

arable from the rest of the instrument and was a binding contract to arbitrate differences which had arisen as to whether El Hoss, the successful bidder, had performed the acts required of El Hoss before Aminoil was bound.

We are of the opinion that this conclusion that the arbitration clause was separate from the rest of the contract was erroneous. *Robert Lawrence* was a giant step in the development of a federal substantive law of arbitration and in the implementation of the federal policy that encourages the private resolution of commercial disputes. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978, 985 (2 Cir. 1942). The aim of *Robert Lawrence* was to destroy frustration of the Arbitration Act by a litigant's cry of fraud in the inducement, a claim that would require a preliminary court adjudication in every case where the cry was raised. See 271 F. 2d at 410. Therefore, we concluded that it was consistent for parties to agree to arbitrate among the issues arising under their contract the issue of whether fraud existed in the inducement. Under the circumstances present in the *Robert Lawrence* situation, a contract for the sale of goods, the parties were found to have so agreed. There was no allegation of fraud in the inducement of the arbitration clause of the agreement but that cry was raised only as to the subject matter of the contract, the sale of the goods, and therefore we found that the arbitration agreement was separable from the rest of the agreement.

This is not the situation before us in the present case. Aminoil made it clear that the enjoyment by a bidder for the contract of the contractual fruits and duties was conditioned on the bidder's prior performance of the prior acts required of that successful bidder. See *United Engineering Co. v. Broadmax*, 136 Fed. 351 (2 Cir.), *cert. denied* 197

U. S. 624 (1905); *Berk & Co.* v. *Director*, 301 N. Y. 110 (1950). Every clause including the arbitration clause was expressly so conditioned. This poses quite a different problem from the problem posed by a cry of fraud in the inducement. Here there is no likelihood of sham litigation to avoid submitting issues to arbitration. A complete reading of the contract discloses that Aminoil sought to protect itself from being bound by the agreement until the bidder met the conditions incumbent upon it initially to meet. There is no reason in fact or in law for a frustration of this clearly demonstrated intent. Aminoil was proposing to sell a million dollars worth of transportation equipment and was further proposing to lease from its purchaser the equipment it had sold to the purchaser and was agreeing to pay a substantial rental therefor. Considering the size of the transaction it is patently understandable that Aminoil would choose to condition its obligations under the contract, including its obligation to arbitrate, upon the prior performance by the bidder of basic financial guarantees.

We concern ourselves here, as the courts concerned themselves in *Robert Lawrence* and *Kinoshita*, with ascertaining the intent of the parties from an examination of the entire instrument they bound themselves by and from the meaning of the language they used in their agreement—the traditional approach of common law judges when questions involving the validity or interpretation of contracts are presented for judicial resolution. The agreements in the three cases differ from each other. In *Robert Lawrence* there was no language obstacle to considering the arbitration clause a separable clause and to reading it so that it would encompass a dispute as to whether entry into that contract was induced by fraud. In *Kinoshita & Co.* the

words of the arbitration clause were readable so as not to encompass an agreement to arbitrate an issue of fraud in the inducement. In the present case the document before us is an integrated document where every clause, including the clause providing for arbitration, that binds both parties is carefully conditioned on the prior performance of the specified conditions by one of these parties. We find this fact to be a clear and unambiguous obstacle to a separability of the arbitration clause from the remainder of the agreement, and we read the entire contract as demonstrating a clear intent on the part of both parties not to arbitrate any dispute with reference to whether there was a full performance of these threshold conditions.

Although the U. S. Arbitration Act looks favorably upon arbitration it does not dictate that we should disregard parties' contractual agreements that contain specific language outlining the boundaries of the areas intended to be arbitrable areas.

> "The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness." *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299 (1929) (Cardozo, *C. J.*).

We reverse the decision of the court below.

Although we are not required to apply state law it will not be amiss for us to consider it. After the argument before us in *Robert Lawrence* the N. Y. Court of Appeals

decided *Petition of Uraga Dock Co.*, 6 N. Y. 2d 773 (1959) in which that court was faced with a situation where the contract that contained the arbitration clause specified that the contract "shall become effective only on fulfillment and realization" of certain conditions. Among these conditions was one that the builder, on the one hand, "agrees" to deposit a security agreement drawn on a specified bank, and one that the buyer, on the other hand, "shall" make a specified down payment. In construing the contract the Appellate Division of the Supreme Court of New York had held by a divided court, 3-2, that the buyer was obligated to perform the conditions when the agreement was signed and that, as there were mutually binding obligations on the part of both parties, the contract, including the arbitration clause, became immediately operative, 6 App. Div. 2d 443, 179 N. Y. S. 2d (1st Dep't 1958). In a memorandum decision, the N. Y. Court of Appeals, a single judge dissenting, affirmed the Appellate Division without comment. In *Uraga* there were certain acts to be performed by both parties to the bargain. The Appellate Division interpreted the agreement to have obligated both parties to the performance of these acts. There is no indication in the agreement we are construing that El Hoss, though the successful bidder, was bound to Aminoil by any commitment on its part to perform the conditions. *Petition of Uraga Dock Co., supra*, has never been followed by the N. Y. Court of Appeals or, from our search, by any of New York's lower courts; and *Board of Education* v. *Heckler Elec. Co.*, 7 N. Y. 2d 476 (1960), followed in *Board of Education* v. *Bernard Associates No. 3, Inc.*, 11 App. Div. 2d 1038, 206 N. Y. S. 2d 140 (2d Dep't 1960), casts some doubt on its long range effect. In *Heckler Elec. Co.* the

N. Y. Court of Appeals decided that a failure to comply with the notice provision of New York Education Law § 3813 precluded arbitration, declaring that the applicability of § 3813 was a preliminary matter for the court for it involved "a condition precedent to Heckler's very right to arbitration and the arbitrator's very jurisdiction." 7 N. Y. 2d 476 at 481. The majority did not expressly disapprove of *Uraga Dock Co.*, although the dissenting opinion of Judge Froessel, 7 N. Y. 2d 484, relied upon it. We see no distinction that would justify reaching different results between conditions precedent to arbitration whether statutory, as in that case, or contractual, as here.

We have decided that the parties did not agree to arbitrate any disagreements as to performance by El Hoss of the threshhold acts it was required to perform. We hold that adjudication of those disagreements is the responsibility of the court; and our next inquiry is directed to discovering whether El Hoss did in fact perform the acts which, if performed, would give it the right to obtain a court order directing arbitration of all disputes arising from disagreements "as to the effectuation of * * * or performance * * * of the agreement."

No findings on this issue were made below, for the theory of the lower court decision rendered them unnecessary. Therefore, no opportunity has been accorded the parties for a trial with reference thereto. The present record consists only of the sworn affidavits of the officers and the attorneys of the respective parties, with the correspondence of the parties annexed as exhibits. Aminoil's affidavits state that the conditions were never performed. El Hoss's affidavits state that it substantially complied with the conditions, and that Aminoil's actions made it impossible fully

to comply. Therefore, there would appear to be issues of fact as to whether the conditions were performed, waived or excused. These issues should not be determined on affidavits, but rather a full trial should be had. See *Alvado* v. *General Motors Corp.*, 229 F. 2d 408, 411-12 (2 Cir.), *cert. denied* 351 U. S. 983 (1956). We remand this cause for a full trial of the issue as to whether El Hoss performed the necessary conditions required of it in order that the contract might become effective and El Hoss could therefore compel Aminoil to proceed to an arbitration.

Reversed and remanded for further proceedings not inconsistent with this opinion.

CLARK, *Circuit Judge* (dissenting):

The majority decision in my view is an undesirable departure from the liberal arbitration policy enunciated by this court in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2 Cir., 271 F. 2d 402, certiorari granted 362 U. S. 909, dismissed 364 U. S. 801, and by the New York courts in *Petition of Uraga Dock Co.*, 6 A. D. 2d 443, 179 N. Y. S. 2d 474, affirmed 6 N. Y. 2d 773, 186 N. Y. S. 2d 669. The question before us is not whether arbitration is good or bad or whether a lawyer is wise in initally advising his client to sign an agreement containing a comprehensive arbitration clause. The question is whether parties, by the device of an agreement which they have accepted to arbitrate future disputes, may obtain a speedy and efficient substitute for litigation in our crowded courts. As this court recognized in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, *supra*, Congress clearly intended that such a substitute should be available.

Appendix B

Under Section 4 of the Federal Aribtration Act, 9 U. S. C. § 4, a party to an arbitration agreement can obtain specific performance through an expedited motion practice, provided there is no substantial issue as to whether the other party entered into an agreement to arbitrate the dispute in question. "Upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U. S. C. § 4. My brothers and I differ as to how far the court, in determining the question of the "making of the agreement for arbitration," should consider the consequences of defective performance of the contract itself upon the effectiveness of the arbitration provision. When conditions are specifically attached to the arbitration provision, such as the giving of certain notice or the prior use of grievance machinery, there is no doubt that the court must determine whether these conditions precedent have been complied with before directing the parties to proceed to arbitration. The problem which has caused difficulty is whether the court must also evaluate compliance with those contract provisions which constitute conditions precedent to the contract generally, but which are not expressly made conditions precedent to arbitration. If the court intrudes into such matters of performance, it greatly multiplies the expense and delay attendant upon arbitration. Furthermore, in determining the adequacy of performance, the court is ruling on the merits of the controversy in a field which the parties have thought is better left to businessmen, or experts, or some other class of persons than judges and juries. And since the distinction between conditions precedent and conditions subsequent is seldom clearly drawn, a party resisting arbitra-

tion is sorely tempted to invoke court proceedings to determine whether certain terms of the contract are not in fact conditions precedent and whether a full trial is required of the complicated issue of performance.

Therefore, in order to minimize the likelihood of expensive court proceedings to determine arbitrability, courts should refrain from deciding questions of performance of substantive terms of the contract except where expressly required to do so by the parties. Those terms of the contract which have the function of conditions precedent should be deemed conditions precedent only to the obligation to perform the substantive terms of the contract unless they are expressly made conditions precedent to the duty to arbitrate. Thus in all cases involving the adequacy of performance we would not look to a dimly expressed "intent" of the parties to determine whether the arbitration clause is "separable" from the rest of the contract, but would rather make separability a strong principle of construction, to be overcome only by express language.

For the reasons above stated, I believe that *Petition of Uraga Dock Co., supra*, represents a sound view and should have been followed. I cannot agree with the suggestion that it is distinguishable, for it seems to me on all fours with our case here. Nor can I perceive that the New York courts have in some slight way retreated from the position there taken. The departure from the New York position thus creates a gap between federal and state law in the direction where I must regard the immediate federal trend as erroneous. I therefore agree with Judge Bryan's reasoned and persuasive opinion below, D. C. S. D. N. Y., 183 F. Supp. 394, and dissent.

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 154-105

In the Matter of the Arbitration between
EL HOSS ENGINEERING & TRANSPORT CO., LTD.,
Petitioner,

—and—

AMERICAN INDEPENDENT OIL COMPANY,
Respondent.

Petitioner having moved this Court for an order directing respondent to proceed to arbitration, and the above mentioned motion having been heard before this Court on December 29, 1959, December 30, 1959 and January 8, 1960,

Now, on reading and filing the notice of motion and affidavit of David E. Scoll, sworn to December 21, 1959, the summons and petition or complaint of El Hoss Engineering & Transport Co., Ltd., dated December 21, 1959, the answer to complaint and petition, the affidavit of Ken Bodine, sworn to January 7, 1960 in opposition thereto, the affidavits of Fauzi El Hoss and Abdullah El Hoss, sworn to January 8, 1960 in support of said motion, the supplemental affidavits of Fauzi El Hoss and Abdullah El Hoss, sworn to January 13, 1960 in support of said motion, the affidavit of Walter C. Lundgren sworn to January 8, 1960 in opposition to said motion, the affidavit of Ken Bodine, sworn to January 12, 1960 in opposition to said motion, and upon

all the papers and proceedings heretofore filed and had herein, and the Court having heard David E. Scoll of Taylor, Scoll & Simon, attorneys for the petitioner in favor of the motion, and the Court having heard Walter C. Lundgren, Esq. of Lundgren, Lincoln & McDaniel, attorneys for respondent, in opposition to the motion, and all of the exhibits introduced into evidence at said hearings, and due deliberation having been had, and upon filing the opinion of this Court, it is hereby

ORDERED that the parties herein proceed to arbitration in accordance with the terms of the agreement dated October 1, 1959 and pursuant to the Federal Arbitration Act with respect to any disagreements between the parties as to effectuation or performance of the agreement dated October 1, 1959, or any part thereof, and it is

FURTHER ORDERED that respondent shall within fifteen days from the date of the entry of this order either accept the arbitrator nominated by Petitioner, Theodore H. Kheel, of 477 Madison Avenue, New York, New York, or nominate an arbitrator of its own choosing, in which event, the two arbitrators shall choose a third as provided in the agreement of October 1, 1959, and it is

FURTHER ORDERED that the counterclaim of respondent herein, pleaded in its answer, be and the same hereby is dismissed.

Dated: New York, New York
May 24, 1960

FREDERICK V. P. BRYAN
U. S. D. J.

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration between
EL HOSS ENGINEERING & TRANSPORT CO., LTD.,
Petitioner,

—and—

AMERICAN INDEPENDENT OIL COMPANY,
Respondent.

BRYAN, District Judge:

This is a proceeding to compel arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U. S. C. § 4, and for injunctive relief during the pendency of such arbitration. After a hearing the injunctive relief sought was denied. The question of petitioner's right to compel arbitration remains.

Petitioner, El Hoss Engineering & Transport Co., Ltd. (El Hoss) is a Lebanese corporation with its principal place of business in Beirut, Lebanon. Respondent, American Independent Oil Company (Aminoil) is a Delaware corporation with its principal place of business in New York. The amount in controversy exceeds $10,000. This court, save for the arbitration agreement, would have diversity jurisdiction over the subject matter of a suit arising out of the controversy between the parties under 28 U. S. C. § 1332 (a). It may therefore entertain this petition under Section 4 of the Federal Arbitration Act.

Opinion

Aminoil operates extensive oil producing facilities in Kuwait at the head of the Persian Gulf adjacent to Iraq and Saudi Arabia.

On October 1, 1959 an agreement in writing was signed by El Hoss and Aminoil providing for the sale by Aminoil to El Hoss of a large quantity of automotive and construction equipment, the lease of other similar equipment by El Hoss to Aminoil, the furnishing to Aminoil by El Hoss of the major transportation services required in and about Aminoil's Kuwait oil field operations, and the payment therefor by Aminoil.

The agreement consists of fifty-four typewritten pages and deals in detail with the equipment to be sold to El Hoss by Aminoil and leased by El Hoss to Aminoil, the transportation services to be performed and the manner in which they are to be carried out. Annexed is a lengthy "Operating Guide" of some sixty-nine pages detailing "the procedures covering the procurement and utilization of contract transportation and related services."

The agreement contains an arbitration clause reading as follows:

> "11. In the event of any disagreement between the parties hereto as to the effectuation of this agreement, or performance thereof, or any part of the agreement, each party undertakes to use its best efforts to resolve said disagreement without submission to arbitration. However, should such solution be impossible, the parties hereto will select a mutually acceptable arbitrator whose decision as to the matters presented to him shall be final. If the parties cannot agree on such an arbitrator, each shall nominate an arbitrator of its choice and these shall in turn select a third, and the decision of a majority of this panel of three shall be final as to all matters submitted. This paragraph shall not effect the rights of

the company to terminate this agreement under the provisions of paragraphs three (3) and four (4) of Section One (1)."

The amount to be paid by El Hoss for the equipment to be purchased by it approached one million dollars. The agreement provided that El Hoss was required to furnish a promissory note in favor of Aminoil, guaranteed by an acceptable financial institution, covering unpaid installments of purchase price. El Hoss was also obligated to furnish a performance bond in the sum of $25,000 covering penalties for failure to supply vehicles and equipment in accordance with normal oil field practices. It was further required to provide suitable liability insurance.

The signature page of the agreement reads as follows:

"This agreement consisting of sections one through thirteen inclusive and attachments one through seven inclusive totaling fifty-four pages is signed by authorized agents of the contractor this 1st day of October, 1959.

El Hoss
Witness Claude T. Dinkel, Jr.

and accepted by the Company this 1st day of October, 1959, subject to compliance with the conditions of this agreement as to guarantees or endorsements by third parties in favor of the Company covering the unpaid installments on purchase price, performance bonds and insurance coverage, etc., not later than fourteen (14) days from the date of the acceptance by the Company.

Ken Bodine
American Independent Oil Company
Witness C. E. McCarty"

[1] On or about October 1, 1959, or shortly thereafter, Aminoil turned over to El Hoss the bulk of the equipment

which El Hoss was to purchase under the agreement, and El Hoss commenced the performance of the transportation services which it was to furnish. Time for El Hoss to give the guaranteed promissory note, performance bond and liability insurance and to comply with other similar conditions of the agreement, including certain down payments, was successively extended by Aminoil from October 14, 1959 to November 1, 1959, and then to November 20, 1959.

In the meantime, however, disputes had arisen between Aminoil and El Hoss as to the terms and suitability of the promissory notes, performance bond and insurance which El Hoss was prepared to furnish under the contract, and various proposals of El Hoss with respect to these matters were rejected by Aminoil. The relations between the parties deteriorated, although El Hoss continued to perform transportation services until December 15, 1959, which by then had amounted to over $100,000.

On December 13, 1959 negotiations between the parties with respect to the acceptance by Aminoil of tenders of notes, guarantee, performance bond and insurance terminated. On that day Aminoil advised El Hoss by letter that, effective December 15, 1959, all "negotiations and operations are to cease under the proposed transportation and tariff haul agreement dated October 1, 1959 between American Independent Oil Company and El Hoss Engineering & Transport Company (said agreement never having come into existence)". The letter requested that All Aminoil equipment affected by the agreement be returned immediately. Within the next few days Aminoil repossessed all the vehicles and equipment which had been turned over to El Hoss, with a few exceptions, and commenced to operate with other personnel the transportation services which El Hoss had been performing for it.

Opinion

On December 14, 1959 El Hoss, through its counsel, advised Aminoil that it desired to proceed with arbitration under the arbitration clause of the agreement, and designated Theodore W. Keel of New York as its arbitrator. Aminoil replied "that arbitration * * * does not apply under the present circumstances, and we, therefore, neither accept nor reject arbitration as suggested in your letter".

The present proceeding was then instituted.

Section 2 of the Federal Arbitration Act (9 U. S. C. § 2) provides that

> "A written provision in * * * any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * *, * * * shall be valid, irrevocable and enforcible save upon such grounds as exist at law or in equity for the revocation of any contract."

Commerce as defined in Section 1 of the Arbitration Act includes commerce among the several states or with foreign nations. The agreement at bar involving as it does transactions between an American corporation and a foreign corporation, plainly comes within this definition of commerce. Reynolds Jamaica Mines *v.* La Societe Navalle Caennaise, 4 Cir., 239 F. 2d 689, 693. See, also, United States *v.* Wilson, 7 Cir., 160 F. 2d 745, *cert. den.* 331 U. S. 860, rehearing den. 332 U. S. 787; Omnium Freighting Corp. *v.* United Steamship Corp., Sup. Ct., 1st Dept., 15 Misc. 2d 800, 185 N. Y. Supp. 2d 857.

Section 4 of the Act provides that where a petition to compel arbitration is filed

> "* * * the court shall hear the parties, and upon being satisfied that the making of the agreement for

> arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *."

Thus, the initial questions before the court are whether there was a valid agreement to arbitrate and whether respondent failed, neglected or refused to perform it. If there be triable issues as to these questions then "the court shall proceed summarily to the trial thereof". If, however, there are no such triable issues and these questions are determined in favor of the petitioner on the undisputed facts, all that remains is to construe the agreement and to determine whether the dispute between the parties falls within its ambit. Robert Lawrence Company v. Devonshire Fabrics, Inc., 2 Cir. 271 F. 2d 402, 411.

Here there is no dispute as to the text of the agreement containing the arbitration clause nor as to the fact that both parties signed the agreement on October 1, 1959. There is, however, sharp disagreement, as to the rights and obligations, if any, which arose out of such signing.

Aminoil contends that no binding contract between the parties ever came into existence and that thus there is no agreement on its part to arbitrate. It urges that the acceptance of the agreement of October 1, 1959 "subject to compliance with the conditions of this agreement as to guarantees, or endorsements by third parties in favor of the company covering the unpaid installments of purchase price, performance bonds and insurance coverage, etc., not later than fourteen (14) days from the date of acceptance by the company" was conditional only and that compliance was a condition precedent to the very existence of any contract binding upon it.

Aminoil says that El Hoss never complied with these conditions and that therefore it never became bound by any of the provisions of the agreement, including the agreement to arbitrate. Its position is therefore that on the undisputed facts there is no valid arbitration agreement and that the petition must be denied.

It further says, however, that if the court should determine that it cannot deny the petition on the undisputed facts, a trial is required to determine whether El Hoss ever complied with what Aminoil claims to be the conditions precedent to its obligation to arbitrate.

El Hoss, on the other hand, contends that the undisputed facts show that a valid and binding contract between the parties was made on October 1, 1959 when the agreement was signed, which included the agreement to arbitrate. It asserts that the conditions attached to Aminoil's acceptance on that date were not precedent to the existence of a binding contract but were merely part of the contract entered into. It takes the position that failure to comply with these conditions, if established, could do no more than excuse Aminoil from proceeding with performance of certain of its obligations under the contract and that the question of whether or not Aminoil was so excused is one of the questions to be determined by arbitration under the arbitration clause.

It has now been made clear by Robert Lawrence Company v. Devonshire Fabrics Inc., *supra*, "that Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements" and that it also intended "to exercise as much of its constitutional power [under the

commerce clause] as it could in order to make the * * * Arbitration Act as widely effective as possible". (p. 406.)

The Court specifically held (p. 409):

> "* * * that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricable intertwined."

The *Lawrence* case was concerned with proceedings under the Federal Arbitration Act with respect to an arbitration clause in a contract made in New York between a Massachusetts corporation and a New York corporation which involved an interstate transaction. The court rejected the argument that New York law should govern the validity and interpretation of the arbitration agreement and proceeded to formulate appropriate principles of federal substantive law for that purpose.

In the case at bar the agreement was not made in one of the United States between citizens of different states and did not deal with interstate but rather with foreign commerce. As far as appears the agreement was made and negotiated in Kuwait between a Lebansese corporation

which has no connection with the United States, and a Delaware corporation with its principal place of business in New York. The agreement was to be performed in Kuwait and in the adjacent neutral zone.

The agreement is silent as to the law which is to govern its validity and interpretation.[1(a)] Neither party has made any contention that the law of Kuwait governs any validity and interpretation of the agreement. Nor has either made any reference directly or indirectly to what the law of Kuwait on these subjects is, if any there be. Both have treated the case throughout on the basis that the law of the forum applies, though the respondent urges that the applicable law of the forum is that of New York and the petitioner says that it is federal law.

As I have pointed out, there is nothing before me to show what the applicable Kuwait law might be. If the Kuwait law differed from federal substantive law as applicable under the *Lawrence* case, a problem might be presented arising from the fact that the contract here involving a peripheral aspect of foreign commerce, was made and to be performed in a foreign country and was between a Lebanese corporation having no connection with the United States and an American corporation doing business in Kuwait. *Cf.* Home Insurance Co. *v.* Dick, 281 U. S. 397. But no such question arises in view of the assumption made by both parties that the law of the forum is applicable. Under the circumstances this has the effect of a stipulation between

[1(a)] The provisions in the agreement that the "activities" of the contractor shall be conducted in accordance with the laws and customs of Kuwait, that the contractor shall pay his employees as required by the Kuwait labor law, and that his employees shall obey the rules and regulations of the Kuwait government, in no way relate to such questions. The contractor would doubtless be required to obey such local laws regardless of contract provisions.

them that the case should be governed by the law of the forum and such stipulation shall be given effect.

Parties are permitted to stipulate in the contract itself what law shall be applied in determining its validity and interpretation, at least in cases where that law has some reasonable connection with the issues to be determined. Under such circumstances the courts will give effect to the stipulation of the parties as to the applicable law. Such an agreement of the parties furthers an underlying policy to "reduce litigation [and] relieves courts of problems of resolving ambiguities". Siegelman *v.* Cunard White Star, Ltd., 2 Cir., 221 F. 2d 189; Hal Roach Studios, Inc. *v.* Film Classics, 2 Cir. 156 F. 2d 596; Duskin *v.* Pennsylvania Central Airlines Corp., 6 Cir., 167 F. 2d 727, 730 (dictum).

In the case at bar the parties have chosen the law to be applied after the contract was made, and, indeed, after litigation was commenced. Here the defendant has its principal place of business within the jurisdiction of the forum. Many of the negotiations concerning the controversy between the parties took place here and the petitioner has chosen a New York arbitrator. I see no reason why such an agreement of the parties as to the law to be applied should not be given effect here. In any event, even if I did not treat their assumption as to the applicable law as an agreement between them, the failure of both to raise the question would be effective as a waiver of any rights which either might have to rely on Kuwait law, if such law in fact affects the problem before the court.[1] Patterson *v.* Chicago Great

[1]It may be noted that even were Section 344(a) of the New York Civil Practice Act applicable to proceedings to compel arbitration under the Federal Arbitration Act, that section would not require the court to take judicial notice of foreign law. Walton *v.* Arabian-American Oil Co., 2 Cir., 233 F. 2d 541; Sonnesen *v.* Panama Transport Co., 298 N. Y. 262; Greiner *v.* Freund, 286 App. Div. 996.

Western Ry., 8 Cir. 138 F. 2d 304. See, also, Arams v. Arams, 182 Misc., 328; Lennon v. Cohen, 204 Mass. 414, 421-22; Donaher v. Dal, Inc., 314 Mass. 400, 403.

This conclusion is not affected by Walton v. Arabian-American Oil Co., 2 Cir., 233 F. 2d 541. In that case there was no agreement, tacit or otherwise, between the parties as to the applicable law. On the contrary, the defendant took the position that by neglecting to prove what the Saudi Arabian law was the plaintiff had failed to establish an essential element of his claim. The trial court dismissed the complaint for that reason and the Court of Appeals affirmed on the same basis.

Thus, this case is controlled by the law of the forum which under the *Lawrence* case is federal substantive law.

The first question to be determined is whether by signing the agreement of October 1, 1959 the parties entered into a valid and binding agreement to arbitrate. I hold that they did.

As Judge Medina said in Robert Lawrence Co. v. Devonshire Fabrics, Inc., *supra*, at p. 408.

> "Whether the bargain evidenced by the contract or agreement is or is not valid cannot differ essentially from the question of whether any other meeting of the minds of the parties will be recognized as having created certain rights."

The lengthy agreement entered into on October 1, 1959 imposed mutual and absolute obligations upon the parties. El Hoss agreed, among other things, to furnish transportation services at Aminoil's oil properties, to make payment for the equipment to be sold by it to Aminoil, to lease other equipment to Aminoil, and to supply Aminoil with guarantees or endorsements covering unpaid installments of pur-

chase price, performance bonds and insurance coverage. Aminoil, on the other hand, agreed, among other things, to sell a large amount of equipment to El Hoss, to lease other equipment from El Hoss, and to pay El Hoss for the services which El Hoss was to render at specified rates. Included was an obligation on the part of both parties to submit to arbitration any controversies coming within the arbitration clause. The parties having assumed these obligations, all the indicia of a binding contract were present and such a contract came into being.

Failure of El Hoss to supply the guarantees, performance bond and insurance which it was required to furnish might have the effect of excusing Aminoil from performing certain obligations which it had undertaken under the contract. But the obligations to supply such guarantees, etc. were merely conditions of the contract entered into and the existence of the contract, at least in so far as the obligation to arbitrate is concerned, was not dependent upon performance of these conditions.

The arbitration clause here, as in Robert Lawrence Co. *v.* Devonshire Fabrics, Inc., *supra,* was a separable part of the contract. Neither an alleged breach or a repudiation of a contract precludes arbitration under an arbitration clause. Robert Lawrence *v.* Devonshire Fabrics, Inc., *supra;* Almacenes Fernandez S. A. *v.* Golodetz, 2 Cir., 148 F. 2d 625; In re Pahlberg's Petition, 2 Cir., 131 F. 2d 968; Kulukundis Shipping Co. S. A. *v.* Amtorg Trading Corp., 2 Cir., 126 F. 2d 978. Similarly, illegality of the contract in whole or in part does not operate to nullify an agreement to arbitrate. Wilko *v.* Swan, 2 Cir., 201 F. 2d 439, reversed on other grounds, 346 U. S. 427; Watkins *v.* Hudson Coal Co., 3 Cir., 151 F. 2d 311, *cert. den.*, 327 U. S. 777; Petition of Prouvost Lefebvre, D. C. S. D. N. Y., 105 F. Supp. 757.

In both of such situations an agreement to arbitrate entered into by the parties as part of the contract remains valid and binding upon them.

The arbitration clause in the case at bar is likewise a separable part of the contract. It is thus of no consequence whether Aminoil might be discharged from other obligations under the contract by failure of El Hoss to comply with conditions it was bound to perform.

Such conditions were not conditions precedent to the existence of the obligation to arbitrate, as Aminoil argues. In essence, this is a contract by which Aminoil agreed to sell equipment to El Hoss for an agreed price and to pay El Hoss for specified services upon conditions with which El Hoss promised to comply. This is a common form of bilateral contract universally recognized as valid and binding. See Corbin on Contracts, § 83; Williston on Contracts (Revised ed. 1936) § 666(A); Restatement of Contracts, § 266; Matter of Uraga Dock Co., Ltd., 6 App. Div. 2d 443, *aff'd* 6 N. Y. 2d 773. See, also, Wetzler v. Equi-Flow, Inc., Sup. Ct., 1st Dept., 16 Misc. 2d 524; Grauser v. Brown-Ketcham Iron Works, 204 N. Y. 218; Kellam v. McKinstry, 69 N. Y. 264.

The arbitration clause was a part of that contract and a valid and binding separable provision of it. See Matter of Uraga Dock Co., *supra*; Robert Lawrence Company v. Devonshire Fabrics, *supra*.

Moreover, the validity of the arbitration agreement is not affected, as Aminoil contends, by the provision that the arbitration clause "shall not effect the rights of the Company [Aminoil] to terminate this agreement under the provisions of paragraphs three (3) and four (4) of Section One (1)."

Sections 3 and 4 of Section 1 give Aminoil the right to terminate the agreement on ninety days' notice if it deter-

mines that El Hoss is unable "to adequately or efficiently execute the terms of this agreement". Aminoil has not purported to act under these clauses and both its conduct and its present position is wholly inconsistent with such a termination on notice.

Having determined that there is a valid agreement for arbitration there remain only the questions of whether there is a bona fide dispute between the parties which comes within the ambit of such agreement and whether Aminoil has failed, neglected or refused to perform it.

There is no doubt that there is a controversy between the parties as to, among other things, the claim of El Hoss that Aminoil has failed and refused to carry out its obligations under the contract or to permit performance by El Hoss in violation of its contractual obligations, and as to the claim of Aminoil that El Hoss has failed to comply with the conditions as to guarantees, performance bond and insurance, and that therefore Aminoil has no obligation to perform.

The arbitration clause provides that "in the event of any disagreement between the parties hereto as to the effectuation of this agreement, or performance thereof, or any part of the agreement," each party in the event of failure to resolve such disagreement shall select an arbitrator and proceed in due course to arbitration.

The controversy here plainly arises from disagreement as to the effectuation or performance of all or part of the agreement and falls directly within the ambit of the arbitration clause. It is immaterial whether Aminoil claims to have rescinded the contract and that El Hoss disputes this claim as well as Aminoil's right to rescind. See Robert Lawrence Company v. Devonshire Fabrics, Inc., *supra*, at p. 411. Indeed, it would be a distortion of the plain intention of the parties to hold that the existence of the arbitra-

tion clause is dependent upon the answers to the very questions which they contemplated would be determined by the arbitrators.

This is not a case such as Kulukindus Shipping Co., S. A. *v.* Amtorg Trading Corp., *supra*, 126 F. 2d 978, on which respondent places much reliance, where there was a question of fact as to whether the defendant had ever agreed to anything at all. Indeed, the controversy here is perhaps more clearly within the ambit of the arbitration clause than in the *Lawrence* case where the defendant claimed the right to rescind because of fraud in the inducement. Even under the more restrictive policy with respect to arbitration laid down in the New York cases the present controversy would be arbitrable. See Matter of Uraga Dock Co. (Mediterranean SS. Co.) 6 App. Div. 2d 443, *supra;* Wetzler v. Equi-Flow, Inc., *supra.*

There is no doubt that Aminoil has failed, neglected or refused to proceed with arbitration. Its letter of December 14, 1959, stating that arbitration did not apply and refusing to accept or reject arbitration requested by El Hoss, makes that plain.

The respondent will therefore be directed to proceed with arbitration in the manner provided in the arbitration clause in the agreement between the parties of October 1, 1959. The order to be entered will provide that respondent shall, within fifteen days, either accept the arbitrator nominated by the petitioner or nominate an arbitrator of its choice as such clause requires.

Settle order on notice.

Dated: New York, N. Y.
May 5, 1960.

FREDERICK V. P. BRYAN,
U. S. D. J.

APPENDIX C

NEW YORK CIVIL PRACTICE ACT

ARTICLE 84

ARBITRATION

1448. VALIDITY OF ARBITRATION CONTRACTS OR SUBMISSIONS.

Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A written submission or provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies existing at the time of the submission or thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of such controversy or controversies.

Such submission or contract may include or be limited to questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent,

subsequent to or independent of any issue between the parties, without regard to the justiciable character of such questions or controversies.

1449. Form of Contract or Submission.

A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

1450. Remedy in Case of Default.

The making of a contract or submission for arbitration described in section fourteen hundred forty-eight, providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme court of this state to enforce such contract or submission and to enter judgment on an award thereon. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in such section may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission.

If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, not later than five days after the service of the order directing a trial of such issue,

demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. When ever an immediate trial is ordered the order therefor shall provide that if the court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration was made or a submission was entered into, as the case may be, and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order shall provide that if the court or jury, as the case may be, find that there was no such contract or submission or failure to comply therewith then the proceeding shall be dismissed.

The procedure herein provided shall be applicable to any motion made under this article in which an issue is raised as to the making of the contract or submission or the failure to comply therewith.

1451. Stay of Proceedings Brought in Violation of an Arbitration Contract or Submission.

If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, the supreme court or the court in which such action or proceeding shall be brought, or a judge thereof, upon being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission.

APPENDIX D

Excerpts from Stenographer's Minutes of Hearing on Preliminary Injunction and Motion to Compel Arbitration

* * * * *

(178) Mr. Lundgren: I think, your Honor, unless your Honor were prepared to deny the motion, and this goes for both motions, I would say that we would be in the case of arbitration desirous, as the statute provides, of a trial, because I think there would be facts that would be important.

The Court: What sort of facts?

Mr. Lundgren: The background facts to various provisions. There are provisions in there that involve both the arbitration clause, like the word "effectuation".

The Court: No, no, we are not going to take the contract and allow oral testimony with respect to what "effectuation" means.

Mr. Lundgren: Only the background facts, your Honor, so your Honor will be in a position to consider the position of the parties at the time, not to vary anything that is clear and unambiguous. I think that unless——

The Court: Frankly, I would say to any such question, if, as under the Devonshire case, the question of the fraud in the inducement is one for the arbitrators under the Federal Arbitration, it seems to me that my getting into these various questions is usurping the function of the arbitrators. Quite plainly, I don't (179) quite understand it, define a little further for me what you mean, what sort of facts.

Appendix D

Excerpts from Transcript of Hearing

MR. LUNDGREN: Well, I mean, your Honor, there were communications between the parties as background to this agreement, and that the Court should be in the position of the parties, when it comes to interpreting anything that has (179) any ambiguity in it, because it is very important for the Court to be in a position to understand the position of the parties at the time.

THE COURT: Well, apart from that, would it be your intention to go into conferences and what was said back and forth?

MR. LUNDGREN: Insofar as they were pertinent, yes, your Honor, insofar as they were—and I am not trying to vary anything; I am trying instead to give the background circumstances in which the parties signed them.

THE COURT: Why can't that be done by affidavit? Why do you have to have a trial for that?

MR. LUNDGREN: Well, your Honor, of course I would like to consider that.

THE COURT: After all, Mr. Lundgren, if you are going to have an arbitration, if there is going to be an arbitration, or, plainly, if I just deny the (180) motion out of hand, which I do not intend to do this afternoon, if I deny the motion out of hand or I plan to deny the motion, there is no need for your being heard—not being heard, but to go into a hearing.

MR. LUNDGREN: No need of a trial at all.

THE COURT: Assuming that I don't, I don't see why whatever facts are necessary to establish that you deem relevant can't be put in affidavit form.

Appendix D

Excerpts from Transcript of Hearing

MR. LUNDGREN: The only purpose, your Honor, to having witnesses, I quite agree, would be if there were controverted facts. If there was a dispute, your Honor would be benefitted by having testimony only in that event, but if they are uncontroverted, then I quite agree, I could take these affidavits and I could prepare affidavits with reference to what they stated, and if there is nothing further in the affidavits, no hearing would be required.

(180) THE COURT: I don't see what possibly could be the subject matter of a hearing on the question of a contract, or, let us call it not a contract, let us call it an agreement in writing.

MR. LUNDGREN: An instrument that was signed.

THE COURT: That was signed by the various parties. I can't see what possible questions of fact (181) there would be for this Court to decide on which there should be a trial.

MR. LUNDGREN: Well, your Honor, if when we state in affidavits in opposition to what they have submitted facts, there are serious issues of fact——

THE COURT: Well, I told you we will get to that in due course but I would say to you this: that unless I find that there are material and relevant issues of fact from the affidavits that are finally submitted to me—I am limiting myself solely for the moment to the question of the arbitrability of these questions—unless I find that there are material and relevant issues of fact that require a trial after submission of affidavits, I am not going to have a trial.

MR. LUNDGREN: Well, I think that would be quite correct, if there is no relevant issue.

Appendix D

Excerpts from Transcript of Hearing

THE COURT: I do not see any reason at this point to set up or to order that there be a hearing on the arbitration question until I see what everybody has before me, and see whether there are any issues of fact that I consider relevant that require a trial.

MR. LUNDGREN: I quite agree, your Honor. I think that should come first.

* * * * *

(204) THE COURT: * * *Now we come to the question of the motion or the proceeding to compel arbitration under the Federal Arbitration Act. I don't want to hear any (205) more argument on the merits of that question. However, I indicated that first of all I would be glad to take any additional papers that either of the parties wanted to submit on that question, and I also will be prepared to take any additional briefs either of the parties want to submit within such time as we fix this afternoon.

If after reading the affidavits submitted by both parties I should then determine that there are some issues of fact which require determination before I can decide whether the petitioner is entitled to arbitration or not, I will fix a date for such a hearing. Otherwise I will render my final decision on the question of arbitration as rapidly as I can.

How much more time do you gentlemen want to submit affidavits? I would suggest that that time be reduced to a minimum, because by now it is over a week since we had our original hearing here, and it shouldn't seem to me that the facts bearing on the arbitration question should take very long to assemble.

Office-Supreme Court, U.S.
FILED
AUG 5 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 209.

EL HOSS ENGINEERING AND TRANSPORT CO., LTD.,

Petitioner,

against

AMERICAN INDEPENDENT OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION.

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August 4, 1961.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 209.

EL HOSS ENGINEERING AND TRANSPORT CO., LTD.,
Petitioner,

against

AMERICAN INDEPENDENT OIL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION.

Question Presented.

Petitioner's statement of "questions presented" is incorrect and is prefaced by a paragraph of alleged "facts" which is highly distorted, as will be shown. Among other things, it states as a fact that a contract to arbitrate was made although this is the real issue to be decided.

The only real question here is one of the proper construction of the instrument dated October 1, 1959 (49-83).* Therein lies the difference between the District Court opinion, and that of the Court below.

The question is:

Did the Court of Appeals properly construe said instrument in finding that, by specific and express language, all of the terms of the 54 page instrument, including the arbi-

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* References by number only are to the Appendix to the main brief for respondent-appellant in the Court below contained in a separate volume.

tration clause, were only qualifiedly "accepted" by respondent, "subject to" certain financial conditions first being performed within a certain specified time, and therefore, as requiring that the dispute in the affidavits as to whether these financial conditions were performed, waived, or excused, must be determined by a trial, rather than by arbitration, because only if they were performed, waived, or excused would the arbitration clause become effective.

There is no conflict between Federal and New York law in regard thereto, as we shall see. Therefore, no choice of conflicting law is involved.

Statement of the Case.

A brief statement of facts is necessary in order to correct the misleading picture given by the Petition.

This is a case where petitioner was to receive a very substantial contract providing it met certain financial conditions which were understandably vital to respondent. Petitioner failed to meet the conditions and hence failed to get the contract. The contract was thereupon awarded to another concern which met the conditions and thus got the contract.

In 1959, respondent proposed to sell its transportation equipment in Kuwait valued at nearly one million dollars and to lease back this equipment from the successful bidder at a substantial rental for use in connection with its oil field operations in Kuwait. It distributed a 54 page instrument upon which prospective bidders could tender bids.

On the last page of this instrument, below the signature of the bidder, there was a space for the acceptance of the best bid, by respondent, with a proviso referring to each and every one of the thirteen Sections and Attachments of the instrument, totalling 54 pages, and stating that they

were "accepted" by respondent only "subject to compliance" with certain specified financial conditions within 14 days (83).

Part of what was thus qualifiedly "accepted" by respondent, providing certain financial conditions were performed within 14 days, was an arbitration clause contained in Section One of the instrument.

These financial conditions involved a guarantee of payment by an acceptable financial institution of almost a million dollars as the purchase price of the equipment to be sold by respondent, and a performance bond relating to the services to be performed by petitioner, as well as insurance relating to the equipment and the performance of services.

Naturally, if the financial assurances were not received, respondent was not willing to sell or go ahead with the transaction at all so its acceptance of the successful bidder's tender was made "subject to" these financial conditions first being met.

Thus, the entire transaction contemplated by the proposed agreement depended on the financial conditions first being performed.

Misrepresentations in Petition.

The Petition baldly asserts that a contract was "entered into" containing an arbitration clause covering "any disagreement,"* and also that there was performance under the alleged contract (pp. 2-3, 5). These statements are misrepresentations and highly misleading. They are not supported by any reference to the record.

---

* A dispute as to whether a binding contract to arbitrate was made is not arbitrable but must be decided by a court or jury under Section 4 of the Federal Arbitration Act, 9 U. S. C. A. §4. Moreover, what was to be arbitrated here if the clause became effective was limited. On such important matters as the very existence or termination of the agreement, arbitration was not to apply (51, 49-50, 92, 111-112; also p. 7 of main brief and pp. 4-5, 6-8 of reply brief of appellant below).

The vital fact is that each and every provision of the instrument dated October 1, 1959, including the arbitration clause, was only qualifiedly accepted by respondent because at the top of the signature page all thirteen Sections and Attachments totalling fifty-four pages are referred to (the arbitration clause being contained in paragraph 11 of Section One), and then these are "accepted" by respondent only "subject to compliance" with the financial conditions referred to within 14 days (83).

The Petition carefully avoids discussing the language in the first paragraph of the signature page which identifies each and every term of the instrument dated October 1, 1959, including the arbitration clause, and is then followed by the qualified and conditional acceptance of respondent (83).

No attempt is made by petitioner to show that this acceptance of the arbitration clause was unqualified or unconditional.

Nor is any attempt made to deny that without an unqualified and unconditional acceptance of the arbitration provision there could be no binding contract to arbitrate.

This is not a case of rescission or repudiation of an existing contract, but a case of no contract ever having come into existence because the financial conditions qualifying the acceptance of respondent were not performed.

The misrepresentations in the Petition as to alleged "performance under the instrument dated October 1, 1959" (pp. 2, 3, 5), are also highly misleading.*

---

* Since the acceptance of respondent is plainly qualified by unambiguous language, parol extrinsic facts are inadmissible to vary or contradict the written instrument (*Brainard* v. *New York Cent. R. Co.*, 242 N. Y. 125, 133 (1926), *St. Regis Paper Co.* v. *Hubbs & Hastings Paper Co.*, 235 N. Y. 30, 35, 36 (1923)), which could not be amended orally (51).

Title to the equipment owned by respondent and covered by the proposed agreement was never transferred to petitioner (122, 130) and accordingly there was no lease-back of any of this equipment. This was not done because the conditions precedent to the acceptance of respondent becoming binding were never performed by petitioner. Thus the transaction contemplated by the proposed agreement was never performed by either party.

The things which were not done during the period which was provided for the performance of the financial conditions, as well as the things which were done, show clearly that the parties recognized that there was no binding contract in effect. For convenient reference, the facts in this regard are more fully set forth in Appendix A annexed hereto.

The Opinions Below.

The District Court's opinion was that the issue of whether or not the financial conditions were performed, waived, or excused, concerning which there was a sharp controversy, (17, 31-37, 99, 106-108; also A-1 to A-3 in Appendix of respondent's Reply Brief below), was for the arbitrators to decide (pp. 26, 45-46 Appendix of Petition).

The Court of Appeals reversed and remanded the case to the District Court for a trial on this issue, pointing out that the acceptance of the arbitration clause was specifically qualified by the requirement that these financial conditions first be performed and that, therefore, arbitration could not be compelled unless and until it was found that the financial conditions were performed, waived, or excused (pp. 26-27 of Petition).

The minority opinion below goes on the erroneous premise that the financial conditions were "conditions precedent

to the contract generally", but were "not expressly made conditions precedent to arbitration" (p. 28, Appendix B of Petition). This is directly contrary to the specific language used in the instrument itself (83), as pointed out by the majority opinion below:

> "This conditional acceptance expressly applied to 'this agreement consisting of sections one through thirteen inclusive and attachments one through seven inclusive totaling fifty-four pages'—i.e., it applied to the entire instrument." (p. 21, Appendix B of Petition), . . . "Every clause including the arbitration clause was expressly so conditioned" (p. 23, Appendix B of Petition).

I. The Basic Principles of Law Are Not in Dispute.

The principle of law applied in this action by the Court below that there must be an unqualified acceptance by both parties of an arbitration clause before it becomes effective and enforceable as a contract, is a rule of general application to contracts, which is time honored, universally accepted, and recognized in all state and federal courts.

> *Williston on Contracts* (3rd Ed. 1957), Vol. 1, §§72, 77;
> *Iselin* v. *United States*, 271 U. S. 136, 139 (1926);
> *Columbia Malting Co.* v. *Clausen-Flanagan Corporation*, 3 F. 2d 547, 549 (2d Cir. 1924);
> *Poel* v. *Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 319 (1915);
> *Schenectady Stove Co.* v. *Holbrook*, 101 N. Y. 45, 48, 49 (1885).

When the acceptance of the terms of a proposed contract is made "subject to compliance" with certain conditions

within a specified time, the conditions must be met before there will be a binding contract. *United Engineering & Contracting Co.* v. *Broadnax*, 136 Fed. 351, 354 (2d Cir. 1905), cert. denied, 197 U. S. 624 (1905); *F. W. Berk & Co.* v. *Derecktor*, 301 N. Y. 110, 112 (1950).

It is equally well settled that if there is a dispute as to whether or not a contract to arbitrate was made, this dispute cannot be decided by arbitrators, but must be decided by a trial before the court, as the Court below decided here. This is specifically provided by both the Federal and New York Arbitration statutes, and is uniformly recognized by the cases.

9 U. S. C. A. §4;
New York Civil Practice Act §1450;
Kulukundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F. 2d 978, 985 (2d Cir. 1942);
In Re Kinoshita & Co., 287 F. 2d 951, 953 (2d Cir. 1961);
In Re Kramer & Uchitelle, Inc., 288 N. Y. 467, 472 (1942);
S. M. Wolff Company v. *Tulkoff*, 9 N. Y. 2d 356, 363 (1961).

II. There is No Conflict as to the Principles of Construction Applied.

The construction of the instrument involved here to determine whether there was an unqualified acceptance by both parties of the arbitration clause involved a careful examination of the entire instrument to determine the intent of the parties as revealed by the language used. This method used by the Circuit Court of Appeals to determine whether or not a contract to arbitrate was made is in accordance with well established principles of construction

which are applied in both the Federal and New York State courts.

United States v. *Moorman*, 338 U. S. 457, 462, 463 (1950);
In Re Pahlberg Petition, 131 F. 2d 968, 970 (2d Cir. 1942);
Cir. 1942);
Marchant v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299 (1929);
Brainard v. *New York Cent. R. Co.*, 242 N. Y. 125, 133 (1926).

Not a single case is cited by the petitioner to show that there is any conflict between the Federal and New York courts with respect to the principles of construction applied by the majority opinion below.

As Chief Judge Cardozo of the New York Court of Appeals stated, in *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929), (p. 299):

> "The question is one of *intention*, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness." (Emphasis added.)

This language of the New York Court of Appeals is quoted by the majority opinion below (p. 24 in Appendix B of Petition).*

* The recent case of *Exercycle Corporation* v. *Maratta*, 9 N. Y. 2d 329, 334 (1961) also quotes language from the *Marchant* case that the intention is controlling, as we shall show.

To say that there is any rule of construction in either the Federal or New York State courts which disregards the plain language and intent of the parties, and compels arbitration regardless of a contrary intent specifically expressed is wholly untenable.

III. The Application of these Well Settled Principles of Construction to this Particular Instrument Only Concerns These Parties and is Not a Matter of General Importance Which this Court Should Consider.

The action of the Court of Appeals merely involved: (a) following the well settled principle that there must be a contract to arbitrate before compelling arbitration and (b) construing the particular instrument involved herein, under ordinary principles of contract construction, and finding, that since the acceptance by respondent of the arbitration clause was qualified by the requirement that certain financial conditions first be performed, there must be a trial to determine the dispute as to whether or not these financial conditions were performed, waived, or excused.*

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* The conditional acceptance by respondent constituted a counter-offer, which called for actual performance of the financial conditions before respondent would be bound by any of the terms of the instrument dated October 1, 1959, including the arbitration clause.

Moreover, petitioner did not promise anywhere in what it signed to perform these financial conditions within 14 days. This was merely a condition attached to respondent's acceptance, which, if not performed, would prevent petitioner from acquiring a right, but subjected petitioner to no liability.

As Williston on Contracts (Revised Ed. 1936), Vol. 3 §665 states:

> "Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability."

Thus, the determination of whether or not there was a contract to arbitrate in this particular case involves the construction of a specific and unique instrument, which only concerns these parties. No question of general importance is involved because the principles applied by the Court below are well settled under both the Federal and New York cases.

IV. The Reasons Urged by the Petitioner are Without Merit.

The contention (p. 6 of Petition) that this case raises important and novel questions of "statutory construction" which were raised in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), cert. granted 362 U. S. 909 (1960), is incorrect. In this connection it is argued that under the Federal Arbitration Act the arbitration clause should be considered separable as a rule of statutory construction (p. 9 of Petition).

However, in the instant case, even if the arbitration clause were considered separable from the other terms of the instrument, this would make no difference because, in any event, the acceptance by respondent of the arbitration clause was qualified and conditional upon certain financial conditions first being performed. Therefore, the dispute as to whether these financial conditions were performed must be decided by the court before arbitration could be compelled. Thus, we have here, as the Court below held (pp. 23-24 in Appendix B of Petition), a "language obstacle" to finding that there was a separate contract to arbitrate whether the financial conditions were performed because these financial conditions qualified the acceptance of the arbitration clause itself.

There was no language obstacle to separability in the *Lawrence* case. There the Court found "a valid agreement to arbitrate" (p. 411) because the alleged fraud did not relate to the arbitration clause. The Court specifically stated, however (p. 411):

> "[If this be no arbitration . . . induced by f

and added that if there were an issue with respect to it to whether the arbitration clause was induced by fraud there there would have to be "a judicial trial of that question" (p. 411). 411).

Thus, the *Lawrence* case makes it plain that anything thing relating to whether or not a binding contract to arbitrate trate was entered into must first be decided by the court, rather ither than by arbitration, which is precisely what the same Cir Circuit Court held here.

Arbitration is based on the consent or agreement of the f the parties.* It is not imposed without consent, by statute tute. The statutes merely implement their intent. This is rec recognized by the *Lawrence* case, where the Court says (p. 41). 410 of Opinion), "parties are entitled to agree, should they they desire to do so", that one of the questions for arbitration tion shall be whether or not the other terms were induced by d by fraud. On the other hand, they may stipulate, as in thi this case, that certain financial conditions must be met befor fore

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* House Report No. 96-68th Congress, 1st Sess, dated January 24, 1924 to accompany H. R. 646, refers to The Federal Arbitration Act as follows: Arbitra-

"To Validate Certain Agreements for Arbitration, on.

* * *

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs."

the arbitration clause, as well as the other terms, will become effective. Then, the court must decide, before compelling arbitration, whether or not the financial conditions were met, as the Court below held in this case.

We shall now examine the list of points urged by petitioner, and briefly indicate why they are untenable.

1) It is argued (p. 7) that there is a conflict between the Circuits as to the applicability of State law. The answer to this is three-fold:

a) Petitioner in the Courts below urged that Federal law was controlling. In fact, in petitioner's brief before the District Court, it was specifically stated (p. 11):

> "This Court need not follow New York law in deciding this petition to arbitrate" (citing *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*).

In accordance therewith, the District Court found that the parties had stipulated that Federal law governed, (p. 40, Petition), and the Circuit Court held that under the circumstances this finding was proper (footnote on p. 20, Appendix B of Petition).

Petitioner now seeks to reverse itself and argues for the first time that New York law applies.

We respectfully submit that even if there were a conflict between New York and Federal law, which is not the case, petitioner is not in a position to raise the matter at this late date, having taken the opposite position below.

> *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 5, 6 (1917);
> *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328 (1945).

b) Contrary to the claim of the Petition (p. 8, 11) the Circuit Court held here that a stipulation of the parties

made Federal law applicable (footnote on p. 20 in Appendix B of Petition) but nevertheless considered New York State law at length in the majority opinion (pp. 24-26, Appendix B of Petition) and found no conflict therein with its decision here.

c) Actually, there is no conflict between New York and Federal law with respect to the action of the Court of Appeals herein. Both jurisdictions require a contract to arbitrate before compelling arbitration and where there is a dispute as to whether financial conditions qualifying the acceptance of the arbitration clause have been performed, waived, or excused, this issue must be determined by a trial because this involves whether or not the arbitration clause became effective and binding, which must be decided by the court, and not by the arbitrators themselves. Arbitrators cannot decide the question of their own jurisdiction, or whether a contract to arbitrate was made. None of the cases cited in the Petition are to the contrary.

In *Petition of Uraga Dock Company*,* 6 App. Div. 2d 443 (1st Dep't 1958), aff'd. 6 N. Y. 2d 773 (1959) (p. 9 of Petition), the Court found that the parties by their language intended a binding contract immediately upon the signing of the instrument so that mutual obligations, including the arbitration clause, became effective upon the signing. There was no language qualifying the acceptance of the arbitration clause such as we have here.

In *Exercycle Corporation* v. *Maratta*, 9 N. Y. 2d 329 (1961) (p. 9 of Petition), the New York Court of Appeals found that the parties "agreed to arbitrate" and that the agreement was broad enough to cover the question of whether or not there was mutuality with respect to the

* Distinguished by the Court below, p. 25 in Appendix B of Petition.

other terms of the agreement, so that the question of mutuality as to these other terms was for the arbitrators to decide. There was no qualification in the acceptance of the arbitration clause, such as we have here.

In *DeLaurentiis v. Cinematografica, Etc.*, 9 N. Y. 2d 503 (1961) (p. 10 of Petition) the New York Court of Appeals again found that there was a contract to arbitrate made by the parties and that the alleged illusory nature of the other provisions was a matter for the arbitrators to decide because it came within the scope of the broad arbitration clause. Again, the acceptance of the arbitration provision was not qualified or conditional as in the instant case.

In these New York cases there was no language obstacle to considering the arbitration clause effective and binding upon the signing so that any dispute coming within its scope would be for the arbitrators to decide. Similarly, the Court of Appeals for the Second Circuit found no language obstacle in the *Lawrence* case.

The opinion of the Second Circuit Court of Appeals in *In Re Kinoshita & Co.* 287 F. 2d 951, which was decided March 16, 1961, less than a month before it decided the instant case, April 10, 1961, was written by Judge Medina who wrote the opinion in the *Lawrence* case. It stated that under principles of the *Lawrence* case (p. 952):

> ". . . we must first examine the record to ascertain whether there is any factual obstacle to considering the arbitration clause as separable. . . ."

Thus, the vital point in the instant case, (pp. 21-24 in Appendix B of Petition) is that there is here a language obstacle to regarding the arbitration clause as binding and effective because this clause, like each and every other term, was specifically referred to in the instrument and then only

qualifiedly accepted by respondent, expressly subject to compliance with the financial conditions within 14 days.

There is nothing in the New York cases to indicate that where there is a language obstacle, making it clear that the arbitration clause is only qualifiedly and conditionally accepted subject to certain conditions first being performed within a certain time, that the New York courts will compel arbitration before these conditions have been performed, waived, or excused.

On the contrary, the New York Court of Appeals in the *Exercycle* case, 9 N. Y. 2d 329 (1961), quoted with approval from *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. at p. 298 as follows (p. 334):

> "Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will *give effect to their intention.*" (Emphasis added)

Then the Court stated certain situations in which the Court will enjoin arbitration, one of which is where there is "a condition precedent to arbitration" (p. 335).

The opinion (Fuld J) then states (p. 336):

> ". . . there is no suggestion of . . . an unfulfilled condition precedent to arbitration (Cf., e.g., Matter of Board of Educ. [Heckler Elec. Co.], 7 N. Y. 2d 476, 199 N. Y. S. 2d 649 *supra*)."

Thus, the *Exercycle* opinion cites *Board of Education, etc.*, v. *Heckler Elec. Co.*, 7 N. Y. 2d 476 (1960), which is also cited by the Court below (p. 25, Appendix B of Petition), where the New York Court of Appeals stated with reference to the language used in previous cases (p. 481):

> ". . . we did not mean thereby to suggest that the arbitrator possesses the power to decide whether the conditions precedent to the institution of the arbitration proceeding itself had been fulfilled."

Moreover, in *S. M. Wolff Company* v. *Tulkoff*, 9 N. Y. 2d 356 (1961), decided by the New York Court of Appeals seven days after the *Exercycle* case, Judge Fuld, who wrote the majority opinion in the *Exercycle* case, speaking for the Court, remanded the case to the lower Court for a trial to determine whether there was "a contract to arbitrate," stating (p. 363):

> "The factual dispute concerning the making of a contract to arbitrate, outlined above, consists essentially of a disagreement over whether the parties' initial telephone conversations 'closed the deal' or whether they were preliminary, or subject, to the subsequent 'Bought Notes' containing the arbitration clause. . . . This must be resolved at a hearing to be held at Special Term."

Thus, it is abundantly clear that the decision below in ordering a trial to determine whether there was a contract to arbitrate, by performance of the conditions qualifying the acceptance of the arbitration clause, is not in conflict with the New York Court of Appeals.

2) Petitioner argues (p. 8-9) that under the doctrine of the separability of the arbitration clause enunciated by the Court of Appeals in the *Lawrence* case, 271 F. 2d 402, the decision of the District Court should have been affirmed. This is not correct.* As we have seen, Judge Medina, who

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* Chief Judge Lumbard of the Court of Appeals, Second Circuit, was a member of the panel that decided the *Lawrence* case and he voted to deny the petition for rehearing by the Court en banc in the instant case (R. 66).

wrote the opinion in the *Lawrence* case, pointed out in the *Kinoshita* case, 287 F. 2d 951 that the doctrine of separability does not apply where the record shows that there is a language obstacle.

Accordingly, the Court below examined the record in the instant case and found, as the majority opinion states (p. 23 in Appendix B of Petition) as follows:

> "A complete reading of the contract discloses that Aminoil sought to protect itself from being bound by the agreement until the bidder met the conditions incumbent upon it initially to meet. There is no reason in fact or in law for a frustration of this clearly demonstrated intent."

And also (p. 24 in Appendix B of Petition):

> "In the present case the document before us is an integrated document where every clause, including the clause providing for arbitration, that binds both parties is carefully conditioned on the prior performance of the specified conditions by one of these parties. We find this fact to be a clear and unambiguous obstacle to a separability of the arbitration clause from the remainder of the agreement, and we read the entire contract as demonstrating a clear intent on the part of both parties not to arbitrate any dispute with reference to whether there was a full performance of these threshold conditions."

Clearly, there was a "language obstacle" to finding a separate contract to arbitrate whether the financial conditions were performed because these financial conditions qualified the acceptance of the arbitration clause itself.

Even where the arbitration clause is regarded as separable, it must nevertheless be unqualifiedly accepted before a contract to arbitrate is made, and here the financial conditions qualified the acceptance of the arbitration clause

so the question of whether they were performed, waived, or excused relates to whether a contract to arbitrate was made, which is for the court to decide, *9 U. S. C. A. §4.*

As Chief Judge Cardozo stated in *Finsilver, Still & Moss* v. *Goldberg, Maas & Co.*, 253 N. Y. 382 (1930) (p. 391):

> "In the absence of a contract expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation."

To say that when an arbitration clause is put in a proposed contract there is always a separate contract to arbitrate when the instrument is signed, regardless of the language used and the intent of the parties, is obviously unwarranted.

3) We have already shown that the decisions in New York which are cited in the Petition (pp. 9-10) are not in conflict with the decision of the Court below in the instant case.

The suggestion that there is a "liberal" doctrine now in vogue in the New York courts which disregards the language and the intent of the parties, and holds that there is an arbitration contract even where the language and intent is to the contrary, is wholly unjustified.

4) The contention (pp. 11-12) that the decision of the Court of Appeals ignores the wording of Section 2 of the Federal Arbitration Act is without merit. The language of Section 2 referred to by the Petition (pp. 11-12) limits the area of attack on the enforceability of the arbitration provision *when a contract to arbitrate has been made* to "such grounds as exist at law or in equity for the revocation of any contract." Obviously, however, a contract to arbitrate must first be made before arbitration can be com-

pelled, as specifically provided in Section 4 of the Federal Arbitration Act. Therefore, when, as in this case, the arbitration clause did not become effective because it was only qualifiedly accepted and the conditions qualifying the acceptance were never fulfilled, clearly there can be no specific performance of an alleged contract to arbitrate because the contract to arbitrate must first come into existence by performance of the conditions precedent.

5) Section 4 of the Federal Arbitration Act specifically requires that there be a trial where there is an issue as to whether or not a contract to arbitrate was made.

Petitioner argues (p. 13) that the language of Section 4 requiring "the making" of "an agreement for arbitration" before compelling arbitration, merely requires that there be a "factual execution of the paper containing the arbitration provision". This is obviously untenable. When the paper signed says in plain words that the arbitration clause is not to become effective until certain conditions are first met, how can this language be disregarded unless indeed, petitioner is arguing that there need be no contract to arbitrate in order to compel arbitration, which is directly contrary to both the Federal and New York statutes as we have seen.*

The Petition (p. 13) goes on the theory that failure to perform the financial conditions would not affect the arbitration clause but would merely involve "defective per-

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* *Wilko* v. *Swan*, 346 U. S. 427 (1953) (pp. 7, 13, 14 of Petition) construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose. Therefore, it in no way supports petitioner.

In *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) (pp. 7, 8, 11, 14 of Petition) a stay of an action in Vermont so that the controversy could go to arbitration was denied on the ground that Vermont law governed since jurisdiction was based on diversity of citizenship and that the arbitration agreement was revocable under Vermont law. This in no way aids petitioner here.

formance of the rest of the agreement", which overlooks the vital point that the financial conditions qualify the acceptance by respondent of the arbitration clause. Moreover, petitioner is putting the cart before the horse in suggesting that the arbitration clause rather than the acceptance clause is controlling (p. 13 of Petition) in a dispute as to whether a contract to arbitrate was made. The language of an arbitration clause indicates what is arbitrable if the clause becomes effective but obviously cannot determine a dispute as to whether it became effective because that is not arbitrable as a matter of law, 9 U. S. C. A. §4.

6) There is no conflict between the Federal and New York State Arbitration Acts with respect to the action of the Court of Appeals in ordering a trial here. Instead, both Acts provide that there must be a judicial trial where there is an issue as to whether or not a contract to arbitrate was made (9 U. S. C. A. §4, New York Civil Practice Act §1450). Moreover, in determining whether a contract to arbitrate was made, the intention of the parties as shown by the language used clearly is decisive under both the Federal and New York cases, as we have shown.

In the instant case, by specific and express language, the financial conditions qualify the acceptance of the arbitration clause as well as the acceptance of the other terms of the instrument. Therefore, they were conditions precedent to the existence of a contract to arbitrate. Accordingly, a dispute as to whether or not these conditions precedent to arbitration were performed, waived, or excused must be decided by a trial.

Conclusion.

The decision of the Court of Appeals was based on a careful analysis of the record in this case and an accurate application of the relevant legal principles. There is no conflict concerning these principles. Therefore, no issue is presented which is appropriate for consideration by this Court. It is submitted that the decision was in all respects correct and the Petition for Certiorari should be denied.

Respectfully submitted,

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August 4, 1961

APPENDIX A.

What was done during the period provided for the performance of the financial conditions, did not constitute any recognition that the instrument dated October 1, 1959 was binding as shown by the following*:

(a) Respondent wrote a letter dated September 27, 1959 (93), which was delivered just before the instrument dated October 1, 1959, was signed (105) which stated specifically that petitioner's bid was accepted only "Subject to Conditions on page 54 of said Tender", which were the financial conditions, and referred also in the first paragraph of said letter to these as "conditions precedent of the contract" (93). Respondent also explained this orally to petitioner before the signing (87-88, 104-105).

(b) The Petition claims (p. 3) that on or about October 1, 1959, "respondent delivered the purchased equipment to the petitioner".

Actually, on a provisional basis, not provided for at all by the instrument dated October 1, 1959, but in anticipation that the financial conditions would be performed within 14 days and the proposed agreement would then become binding (88, 105, 108-111), respondent turned over to petitioner physical possession (not title) of part of the equipment on the explicit understanding stated in a letter from respondent to petitioner dated October 3, 1959 that it was "conditional on your compliance with all the conditions of the contract and no asset may be removed from the Company's operational area prior to your compliance with the terms and conditions of the contract" (431).

(c) Respondent granted an extension to petitioner by letter dated October 23, 1959 in which the financial conditions are specifically referred to as "*conditions*

* This is dealt with in detail in the Reply Brief, pp. 11-20, on behalf of appellant in the Court below, respondent here.

precedent to the agreement'' (140). (Emphasis added)

These letters show that none of the acts of alleged "performance" were either done or received as such by respondent, and as *Williston on Contracts,* (3rd Ed. 1957), Vol. 1, §28A, points out:

> " . . . acts of performance by one party, unless they have been received as such by the other, cannot be evidence that the latter either had previously made an agreement on definite terms, or that he had subsequently assented to a contract."

(d) The second extension letter by respondent to petitioner dated November 9, 1959, granting an extension to November 20, 1959, to perform the financial conditions, refers to the "*proposed* transport leasing agreement dated October 1, 1959" and to the fact that during "the interim period, the operation is to continue as it has since October 1st, with Aminoil retaining title but the El-Hoss Engineering and Transport Company assuming responsibility for the operation and maintenance of the equipment" (130). Thus, respondent made it clear that the operation and maintenance by petitioner during this interim period did not change the fact that the instrument dated October 1, 1959, was only a "proposed agreement" unless and until the financial conditions were performed.

(e) Petitioner recognized by letter that during the "interim period" allowed for performing the financial conditions, replacements of equipment were not made as provided for, but were "postponed till such time as we stood on firm ground" but said they would be made "as soon as this contract is crystallized" (126-129).

(f) The instrument dated October 1, 1959, does not provide for turning over custody of any equipment to petitioner prior to transferring title or for any transportation services by petitioner prior to its obtaining

title so that it could lease it back to respondent. Therefore, this was not done under that instrument but on a temporary provisional basis in anticipation that the financial conditions would be performed within 14 ddays so that the instrument would become effective (888-91, 108-111).

(g) The Petition claims (pp. 2, 5) that respondent notified petitioner to "cease operations under the aggreement". Actually, the letter stated that "all neggotiations and operations are to cease under the *proposed* transportation and tariff haul agreement dated October 1, 1959, between American Independent Oil Company and El-Hoss Engineering and Transport Company (said agreement having never come into existence)" (160) (Emphasis added).

(h) The record (89-91, 108-111) points out that the sale and lease back contemplated in the instrument dated October 1, 1959, were not made during this interim period for finalizing the contract. Petitioner even failed to make the payments upon the signing, which were specifically provided for (53-64, 89-90). Yet, this was not considered a breach because said instrument was not a contract unless and until the financial conditions were first performed.